

with lower minority populations) outside their MSAs. Comments of CBS at 3. MMTC does not object, so long as the Commission expects stations located outside these same MSAs to include in their target workforces areas (usually with higher minority populations) inside the MSAs. Unless the Commission applies CBS' proposed exurban policy to stations inside and outside an MSA, minorities will be considered part of a smaller number of stations' recruitment areas, and will receive relatively fewer job opportunities than Whites solely because of the impact of residential segregation. See Comments of EEO Supporters, pp. 262-64.^{23/}

Broadcasters never seek alternative labor force determinations because they consider their MSA to include too few minorities. Thus, the Commission's test for approval of alternate labor forces, while not unyielding, is rather firm. See Buckley Broadcasting Co., 9 FCC Rcd 2099, 2011 ¶¶16-18 (1994) (subsequent history omitted) (applying a three-part test: distance from minority populations, commuting difficulties, and lack of success of previous recruitment efforts). This test should be maintained with little or no modification.

^{23/} Stations which are truly regional or statewide (e.g., those having news bureaus throughout a region or state) might appropriately seek to define their recruitment area as regional or statewide. See University of North Carolina at Chapel Hill, 47 RR2d 1480, 1485 (1980) (holding that statewide television network may use statewide data for EEO analysis). Moreover, at least for on-air or management jobs, there is merit to AFTRA's observation that "the size of the local minority labor force is irrelevant for broadcasters. In AFTRA's experience, there is no "local" labor pool for broadcasters; the broadcaster labor pool is national. Broadcast station employees, particularly those employed in news, move from station to station and market to market depending on their career status, development and opportunities." Comments of AFTRA, p. 6.

**C. The Commission should convert to annual
 EEO reporting on a "person/month" basis**

The use of a single pay period for Form 395 pleases no one. It is one of only two issues in this proceeding (the other being job fairs) on which nonminority broadcasters and civil rights commenters were of one voice.

One commenter suggested that broadcasters should be allowed to choose the pay period that makes them look best for EEO purposes. Comments of California Association of Broadcasters, p. 8. A better approach was offered in the Comments of ARS. ARS would give stations the option of "tabulating and submitting an 'average' employment profile for the year, based on station employment on a given date each month." For consistency, this should not be an option; it should be done by all stations. However, an even better approach is use of the "person-month" as a unit of personnel measurement over a calendar year. See Comments of EEO Supporters, pp. 323-24. The "person-month" would be more flexible than an "average employment" profile because it accounts for part-time employees, and it offers greater data sensitivity, given its smaller unit of measurement.

**D. The Commission should emphatically
 reject proposals to substitute word of
 mouth recruiting for time-tested EEO
 recruitment for each job opening**

Word-of-mouth recruitment by an almost all-White and all-male group of employees is inherently discriminatory. See, e.g., Triple R, Inc., 42 RR2d 907, 908 (1978); see discussion and cases cited in the Comments of EEO Supporters, p. 334 and n. 416.

There are two backdoor ways to circumvent EEO recruiting requirements and revert to word-of-mouth recruiting. One is the

claim that a position had to be filled immediately.^{24/} The other is the claim that a candidate already known to the licensee is so attractive that recruitment was unnecessary.^{25/}

The Commission cannot accept either excuse. It should make an emphatic statement that a licensee's departure from its EEO program based on haste, or on its early awareness of a strong candidate, is unacceptable. After the fact, it is easy to claim that any job opening had to be filled quickly. Large stations in large markets almost always know of a strong candidate before EEO recruitment would normally occur. Thus, the need for speed, or the existence of a strong candidate, if invoked to trigger a waiver of EEO recruiting, would swallow a station's customary policy of recruiting whenever a job is open.

^{24/} The NAB suggested that licensees may often hesitate to hire or promote persons "including women and minorities" because they have to take the time to recruit broadly. Comments of NAB, pp. 11-12. The NAB offers an anecdote purporting to show that the need for EEO recruitment prevented the hiring of a minority. Actually, that is the rare exception. Before EEO recruiting was required, most broadcasters hired only White men. See Pesha, discussed at p. 9 n. 13 supra. When a broadcaster fails to recruit widely, it has usually preselected a White man it wants to hire. Thus, it doesn't want to go to the trouble to do EEO recruitment which might generate minority and female applicants.

In very rare cases, a person must be hired immediately (e.g., when the only person who knows how to cut payroll checks resigns on a Friday morning). But in the radio business, there is almost always time to fax a notice to recruitment sources asking for prompt referrals of minority and female candidates.

^{25/} There is seldom a rational business justification to waive out of EEO recruiting simply because a strong candidate is already known to a licensee. Even if a good candidate is available, better candidates, particularly minorities or women, may appear when they learn of the job opportunity.

VI. Errata And Updates To The Comments Of EEO Supporters

A. The growth of media concentration

The EEO Supporters thoroughly documented the impact of the Telecommunications Act on media concentration, and the impact of media concentration on the broadcast job market. Comments of EEO Supporters, pp. 61-70. Concentration is increasing so rapidly that it is incumbent upon us to update n. 69 of the Comments of EEO Supporters (on pp. 62-63 thereof) to report that superduopoly consolidation now exceeds 25% of the industry.^{26/}

B. The use of outdated census data to evaluate EEO performance

The EEO Supporters contended that it is irrational to wait thirteen years for the results of a new census to be published before updating the statistical database of minority and female representation in counties and MSAs. Comments of EEO Supporters, p. 227. We add that the Commission does use current census estimates in other areas of regulation besides EEO. In Telephone Number Portability (First Report and Order and Further Notice of Proposed Rulemaking), 11 FCC Rcd 8352, 8492-93 (Appendix D) (1996), the Commission used 1994 population figures for the 100 largest MSAs. The same database can be used for EEO. To reduce burdens for all those who use this data, the Commission should publish it annually and post it on the Internet.

^{26/} Dave Seyler and Tony Sanders, "Superduopoly consolidation pushes beyond 25%", Radio Business Report, October 14, 1996, p. 7 (reporting that 25.4% of all stations in rated markets are or will soon be part of a superduopoly; that superduopoly concentration is now 30.6% in the top 50 markets, and that local concentration, including superduopolies, duopolies and LMAs, stands at 56.4% overall and at 60.3% in the top 50 markets).

C. The appropriate base forfeiture

The EEO Supporters urged the Commission to adopt a higher base forfeiture than the \$12,500 proposed in the NPRM for EEO. Comments of EEO Supporters, pp. 337-39. It has been brought to MMTC's attention that the EEO Supporters should have suggested a specific figure. MMTC proposes the figure \$20,000, the base forfeiture for misrepresentations.

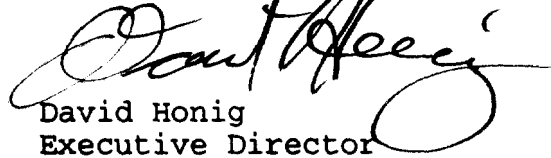
That figure is appropriate for two reasons. First, EEO violations go to a licensee's character. Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 629 (D.C. Cir. 1978); Nondiscrimination - 1968, 13 FCC2d at 771. Second, an EEO violation inherently involves a misrepresentation, because every licensee holds itself out to the Commission as an equal opportunity employer. In order to receive a license or a license renewal, every licensee proposes specific steps to promote equal employment opportunity. If the licensee never intended to do the things it promised the Commission in its application, then the application must be deemed to have contained misrepresentations. Thus, \$20,000 is the correct base forfeiture for EEO.

CONCLUSION

Seldom are the stakes higher for the public interest than they are in this proceeding. As it grapples with pressure from some nonminority broadcasters to eviscerate the only meaningful diversity initiative, the Commission should draw deep from the well of leadership, recognize that sometimes it cannot please all constituencies, stand firm in defense of stronger EEO enforcement, adopt a policy of zero tolerance for discrimination, and design a

plan to provide full equal opportunity by 2009, the one hundreth anniversary of the birth of broadcasting.^{27/}

Respectfully submitted,



David Honig
Executive Director
Minority Media and
Telecommunications Council
3636 16th Street N.W.
Suite AG-58
Washington, DC 20010
(202) 332-7005

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